United States Court of Appeals

for the Second Circuit

APPELLANT'S SUPPLEMENTAL BRIEF

ORIGINAL

74-2639

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P/S.

To be argued by
IRVING ANOLIK

In The

United States Court of Appeals

For The Second Circuit

UNITED STATES OF AMERICA,

Appellee,

- against -

PHILLIP STOLLER and MARTIN FRANK,

Defendants-Appellants,

JEROME ALLEN and ALFRED T. HERBERT,

Defendants.

SUPPLEMENTAL BRIEF FOR DEFENDANT-APPELLANT, MARTIN FRANK

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2

TABLE OF CONTENTS

Contents

Page

TABLE OF CITATIONS

Cases Cited:

Contents

Rules Cited:

Contents

IN THE UNITED STATES COURT OF APPEALS
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- - - - - - - - - - - - - - - - - - - -x

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APPELLANT FRANK'S SUPPLEMENTAL BRIEF

STATEMENT

The appellant, Martin Frank, submits this supplemental brief pursuant to an application made to this Court which is occasioned by the fact that on the 21st day of March, 1975, the co-appellant, Phillip Stoller, unexpectedly withdrew his appeal. In our application to this Court we submitted a letter from John Doyle, Esquire, appellant Stoller's counsel, corroborating the fact that appellant Frank has relied upon Stoller covering certain points. In this supplemental brief we are, therefore, covering at least part of the points we assume that Stoller would

have covered in our behalf while preparing his own brief.

In our original brief we detailed the facts of the case to some extent, which were necessarily somewhat sparse since the defendant-appellant Frank was only convicted of the conspiracy count, Count One, and Stoller was convicted of all the counts (twelve in all) which were submitted to the jury.

We feel that in view of the fact that Stoller has now withdrawn his appeal, that there is no basis for appellant Frank detailing all of the facts relevant to co-defendant-appellant Stoller's appeal.

We wish, however, to address the Court's attention to an issue that co-appellant Stoller would have raised on our behalf, namely the shift in theory of the Government's summation and the Court's charge with respect to the theory which the case was being submitted to the jury.

ARGUMENT

POINT I

THE SHIFT IN THEORY TO THAT OF "UNDISCLOSED UNDERWRITERS" IN THE CHARGE OF THE COURT AND IN THE SUMMATION OF THE GOVERNMENT, PREJUDICED THE APPELLANT SINCE THIS WAS NOT WITHIN THE PURVIEW OF THE INDICTMENT AND WAS NOT THE THEORY UPON WHICH THE CASE HAD BEEN TRIED.

As we indicated in our original brief, pages 76 and 77 thereof, the Government, and later the Court in its charge, submitted the case on the theory of "undisclosed underwriters." The Government argued, at 2219-2221 of the record, that under Count Two, Frank knew that the Government was alleging undisclosed underwriters as its theory. We maintain that this is not accurate and the indictment does not support this theory. The Government, therefore, and the charge of the Court, submitted the issue to the jury on a theory which had not been the charge to which the defense was seeking to destroy [manipulation] but was rather a novel new conception which caught the appellant by surprise.

The Supreme Court of the United States, when addressing itself to the issue of shifting theories and changing the thrust of an indictment from that which the

grand jury found, has held throughout the years that an indictment must allege all of the essential elements of a crime in order to be sufficient. (United States v. Debrow, 346 U.S. 374, 376; Morisette v. United States, 342 U.S. 246 at 270; Ex Parte Bain, 121 U.S. 1, 10; Stirone v. United States, 361 U.S. 212; and, United States v. Denmon, 483 F.2d 1093 (8 Cir. 1973). There are a host of other cases as well which are pertinent).

We must bear in mind that a bill of particulars cannot be used for the purpose of amending an indictment (Russell v. United States, 369 U.S. 749). The bill of particulars did not advise appellants of the fact that the case would go to the jury on the contention of undisclosed underwriters.

In Gaither v. United States, 413 F.2d 1061 (D.C. Cir. 1969), the Court explained id. at 1067:

> "The Supreme Court has continued to adhere to the Bain principle in recent years. In Stirone v. United States, 361 U.S. 212, 80 S.Ct. 270 (1960), the grand jury charged a violation of the Hobbs Act. It found that the interstate commerce affected was the victim's shipment of sand from various other states to his plant in Pennsylvania. The trial judge allowed the Government to intro-

duce evidence of interstate commerce other than that charged -- i.e., the movement of finished steel from the victim's plant outward to other states. The Court set aside the conviction, holding that the proof at trial of these uncharged facts amounted to an amendment of the indictment with respect to the element of interstate commerce. The Court relied on Bain, and quoted extensively from the passage set out above.

In Russell v. United States, 369 U.S. 749, 82 S.Ct. 1038 (1962), the Supreme Court held that a bill of particulars cannot cure a fatally imprecise indictment. The bill of particulars fully serves the functions of apprising the accused of the charges and protecting him against future jeopardy, but it does not preserve his right to be tried on a charge found by a grand jury. The Court again cited the passage from Bain, referred to 'the settled rule in the federal courts that an indictment may not be amended except by resubmission to the grand jury, unless the change is merely a matter of form,'" and stated:

"... To allow the prosecutor, or the court, to make a subsequent guess as to what was in the minds of the grand jury at the time they returned the indictment would deprive the defendant of a basic protection which the guaranty of the intervention of a grand jury was designed to secure. For a defendant could then be convicted on the basis of facts not found by, and perhaps not even presented to, the grand jury which indicted him. ..."

In United States v. Denmon, supra, the Court noted that the failure of an indictment to charge any essential element of the crime as submitted to the petit jury was fatally defective.

Thus, at 483 F.2d at pages 1095, 1096, the Court explained:

> "The Supreme Court when addressing itself to this issue has throughout the years held that an indictment must allege all of the essential elements of a crime in order to be sufficient. United States v. Debrow, 346 U.S. 374, 376, 74 S.Ct. 113, 98 L.Ed. 92 (1953); Morisette v. United States, supra at 270, 72 S.Ct. at 253, n.30; Hagner v. United States, 285 U.S. 427, 431, 52 S.Ct. 417, 76 L.Ed. 861 (1932); United States v. Carll, 105 U.S. 611, 612, 26 L.Ed. 1135 (1881). The Government here, however, would remedy the defect of not alleging criminal intent or mens rea by applying the following 'fairness test' enuciated by Professor Wright:
>
> The fundamental purpose of the pleadings is to inform the defendant of the charge so that he may prepare for his defense, and the test of sufficiency ought to be whether it is fair to the defendant to require him to defend on the basis of the charge as stated in the particular indictment or information. The stated requirement that every ingredient or essential element of the offense should be alleged must be read in the light of the fairness test just suggested. C. Wright, Federal Practice and Procedure,

> §125, at 233-34 (1969) (footnotes omitted).
>
> In applying the 'fairness test,' the Government points out that the District Court properly instructed the jury on specific intent and defined 'knowingly,' 'unlawfully' and 'wilfully.' So it did and it is probable that the defendant was not mislead as to the crime charged, but we think the omission of an admittedly essential element of the offense in the indictment is a matter of substance and not form. Nor can the missing element here be properly implied or inferred from other elements and allegations of the indictment.
>
> We heartily applaud the salutory trend in recent years to simplify the indictment as embraced in Fed.R.Crim.P. 7(c) that only requires that '[t]he indictment or the information shall be a plain, concise and definite written statement of the essential facts constituting the offense charge'. Yet we cannot go so far in economy of words as to approve the omission in an indictment of essential elements of an offense."

Due process of law, the Supreme Court has observed, "requires that the proceedings shall be fair, but fairness is a relative, not an absolute concept .... What is fair in one set of circumstances may be an act of tyranny in others." (Snyder v. Massachusetts, 291 U.S. 97, 116, 117).

Conversely, "as applied to a criminal trial, denial of due process is the failure to observe that fundamental

fairness essential to the very concept of justice." (Lisenba v. California, 314 U.S. 219, 236).

Basic to the very idea of free government and among the immutable principles of justice which no prosecutorial authority may deny or disregard is the necessity of due "notice of the charge and an adequate opportunity to be heard in defense of it." (Powell v. Alabama, 287 U.S. 45, 68).

Thus, where a trial proceeds on one theory, and the Court and prosecutor suddenly send the case to the jury on a theory that was not charged in the indictment and was not the subject of the evidence at the trial proper, the conviction is as much a violation of due process as a conviction upon a charge never made. (Cole v. Arkansas, 333 U.S. 196, 202, and Williams v. North Carolina, 317 U.S. 287, 292.

In Williams, supra, the Supreme Court explained that where a jury verdict of guilty is based upon a general verdict that does not specify on which ground it rests, and one of the grounds upon which it may rest is invalid, the judgment cannot be sustained.

Similarly, a conviction based upon a dearth of evidence (e.g., undisclosed underwriters) cannot stand. (Thompson v. Louisville, 362 U.S. 199; and Garner v. Louisiana, 368 U.S. 157).

A person can be tried only upon the indictment as found by the grand jury, and especially upon the language found in the charging part of the instrument. (Stirone v. United States, 361 U.S. 212, supra, wherein a variation between pleading and proof was held to deprive petitioner of his right to be tried only upon the charges presented in the indictment.

A change in the indictment which is not made by the grand jury, deprives the Court of the power to try the accused. (Ex parte Bain, 121 U.S. 1, 12).

See, also, United States v. Curtis, (10 Cir. 12/4/74,) --F.2d--, 16 CrL 2285, holding that an indictment not specifying the charge submitted, is insufficient to uphold a conviction, despite sufficiency of evidence.

> "For all the indictment shows the grand jury may have had a concept of the scheme essentially different from that relied upon by the government ...instructions cannot save a bad indictment ..." (United States v. Curtis, supra, id

at 16 CrL 2286).

The Court in its charge instructed (tr.3556) that although Frank came into the picture later, he nevertheless became an aider and abettor in the conspiracy, including that of undisclosed underwriters.

> The Court: "Thus the question for you to decide is whether Stoller, Allen, and D'Onofrio should have been listed as underwriters for the TWP stock offering." (tr.3556)

At tr.3558, the Court specifically again told the veniremen that if they found that the aforementioned men were undisclosed underwriters, that they could convict.

At the conclusion of the charge appropriate exceptions were voiced to the Court's unexpected charge.

> "Mr. Gould: I respectfully except to that portion of your honor's charge which relates to the characterization of Stoller, Allen and D'Onofrio as possible ... underwriters within the definition of the '33 Act and that part of the charge which relates to the obligation that their function as underwriters should have been disclosed. I direct your Honor's attention that no such charge is made in the indictment or the bill of particulars. When we asked for particulars as to what misrepresentations were claimed we didn't get anything like that and it was not until yesterday that it

> became manifest to us that the government was contending that these men may have been underwriters and that the failure to identify them as underwriters was a violation of the '33 Act." (tr.3597)

It was further explained in motions to set aside the verdict that the only fraud alleged in the indictment is fraud with respect to a manipulative scheme. The Court's adversion to 5(c) of Count One of the Indictment is erroneous, since the word "underwriter" is used as a factual statement and no charge of "undisclosed underwriters" is made or even suggested. (tr.3654-3656, and Frank's motions to set aside the verdict).

In sum, therefore, the government "pulled the rug" from under the appellants when it suddenly mentioned that "undisclosed underwriters" was the theory which the jury must consider. The Court gave substance to this change in the indictment and helped with the "rug-pulling" by so charging the jury.

POINT II

THE WHARTON RULE, WHICH WAS RECENTLY INTERPRETED BY THE SUPREME COURT OF THE UNITED STATES IN IANNELLI v. UNITED STATES, DOES NOT CHANGE THE THRUST OF THE APPELLANT'S ARGUMENT IN HIS MAIN BRIEF SINCE THE SUPREME COURT EXPLAINED THAT THE RULE WOULD BE ENFORCED EXCEPT WHERE CONGRESS HAS INDICATED A CONTRARY INTENT.

We do not belabor this aspect of the case, except to ask this Tribunal to note that the Supreme Court has not rejected "Wharton's Rule", but indeed has reaffirmed its vitality in Iannelli v. United States, --U.S.--, decided 3/25/75. The Court declared that rule is a judical presumption which must give way to congressional intent to the contrary (17 CrL 3127).

In United States v. McClelland, UCMJ, 11/13/74, 16 CrL 2287, the Court of Military Justice gives further vitality to Wharton's rule, barring a drug conspirator's conviction. There that Court cites this Court's opinions in Vannata v. United States, 289 Fed. 424 (CA 2 1923) and United States v. Zeuli, 137 F.2d 845 (2 Cir. 1943).

POINT III

SINCE VIRTUALLY ALL OF THE STOCK MANIPULATIONS OCCURRED AT MEETINGS OUTSIDE THE UNITED STATES, AND INVOLVED MANY TRANSACTIONS IN SWITZERLAND, THE CASE WAS NOT WITHIN THE PURVIEW OF THE UNITED STATES SECURITIES LAWS.

We submit that there may well be a jurisdictional question herein since many meetings and transactions occurred outside the United States. We ask that this Court consider the well reasoned opinion of Chief Judge Lawrence A. Whipple (D.C.N.J.) in dismissing a complaint of the S.E.C. in S.E.C. v. Kasser, 74-90, cited in 173 N.Y.L.J.61, 3/31/75, p.1.

The Court held that the "essentially foregin nature" of the transactions was not "materially altered by the various miscellaneous acts allegedly committed locally in furtherance of the scheme". In Kasser, the New York office of a Swiss bank was used as a conduit for funds.

Chief Judge Whipple ruled that Congress did not intend to confer jurisdiction on the Federal Courts over an "essentially foreign transaction in American securities unless that transaction has an impact on domestic investors or securities markets."

While we submit that the Court need not reach this question, since there are substantial bases for reversal set forth supra, we neverthless suggest that Judge Whipple's opinion is a relevant consideration to the case at bar.

CONCLUSION

The relief requested in appellant Frank's main brief should be granted.

Respectfully submitted,

Irving Anolik
Attorney for Appellant Frank

A 202 Affidavit of Personal Service of Papers H LUTZ APPELLATE PRINTERS INC

UNITED STATES COURT OF APPEALS
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PHILLIP STOELER AND MARTIN FRANK,

Defendants-Appellants,

Index No.

Affidavit of Personal Service

STATE OF NEW YORK, COUNTY OF NEW YORK *ss.:*

I, Victor Ortega, *being duly sworn,*

deposes and says that deponent is not a party to the action, is over 18 years of age and resides at

1027 Avenue St. John, Bronx, New York

That on the 18th *day of* April 1975 ~~XXX~~ *at* see below

deponent served the annexed Supplemental Brief *upon*

see below

the Attorneys *in this action by delivering a true copy thereof to said individual personally. Deponent knew the person so served to be the person mentioned and described in said papers as the* Attorney(s) *herein,*

Sworn to before me, this 18th

day of April 1975 ~~XXXXX~~

Victor Ortega
Print name beneath signature

VICTOR ORTEGA

Robert T. Brin
ROBERT T. BRIN
NOTARY PUBLIC, State of New York
No. 31-0418950
Qualified in New York County
Commission Expires March 30, 1977

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